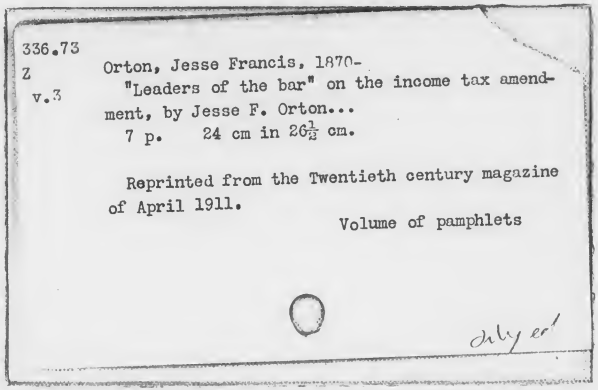
98-84377-10

Orton, Jesse Francis

"Leaders of the bar" on the income tax amendment

[S.l.]

[1911]



336.73
Z
v.3

Orton, Jesse Francis, 1870-
"Leaders of the bar" on the income tax amendment, by Jesse F. Orton...
7 p. 24 cm in 26½ cm.

Reprinted from the Twentieth century magazine of April 1911.

Volume of pamphlets

July er

"Leaders of the Bar" on the Income Tax Amendment

By JESSE F. ORTON, A. M., LL. B.

Reprinted from the TWENTIETH CENTURY MAGAZINE
of April, 1911

"LEADERS OF THE BAR" ON THE INCOME TAX AMENDMENT

By Jesse F. Orton, A. M., L L. B.

TO accuse eminent lawyers of attempting to mislead the people and the law-making body of their state, is a serious indictment of their citizenship. To say that some of the chief arguments employed by them rest on sleight-of-hand methods quite transparent to a careful reader, may surprise even those somewhat familiar with the ways of "eminent" lawyers.

In May, 1910, a resolution ratifying the Income Tax Amendment to the Federal Constitution was passed by the New York Senate and came within one vote of being passed by the Assembly. While it was pending, a "memorandum" in opposition was presented to the Legislature by Joseph H. Choate, William D. Guthrie, Victor Morawetz, Austen G. Fox and John G. Milburn. These learned counsel did not sign their brief as attorneys for————, ————, etc.; but in 1895 Mr. Choate, Mr. Guthrie and Mr. Morawetz, for fees paid by those who stood to pay large income taxes, had secured from the United States Supreme Court a decision that the income tax law of 1894 was unconstitutional. The purpose of the present amendment is to get around the decision of 1895.

These public-spirited citizens foresee dire consequences if the constitutional status existing before 1895 should be restored and Congress should be permitted to tax incomes from the country's immense accumulations of property without apportioning the tax among the states according to population. To unapportioned taxes on the comparatively small incomes from wages, trades or vocations, they see no objection; and the Supreme Court did not decide that such income taxes would be unconstitutional. The key to the situation lies in the fact that income taxes that can be levied only by apportionment among the states in the ratio of population, never will or can be levied at all; other income taxes may be levied. These gentlemen did not represent wage-earners or tradesmen before the court at Washington. Do they represent them now before the Legislature?

Seeing the necessity of pandering to the well-known popularity of an income tax, and especially one levied on income from property as well as from labor, they attempt to show that it would be feasible to levy an income tax by apportionment. The strongest proposition they dare venture is that "the rule of apportionment as a permanent standard is not in itself so grossly unfair and impracticable."

Note their "proof" of this proposition. They say its truth is shown by "the tables submitted with this memorandum." We turn to the "tables"; but not one even purports to give any information as to existing incomes in the several states so as to show how an income tax, if apportioned among the states according to population, would affect the residents of the various states. Lacking relevant or genuine proof, these gentlemen substitute the irrelevant and spurious. Their "tables" show the tax rates which would result in the different states from apportioning, according to population, a direct *ad valorem* tax of $100,000,000 *on property,* not on incomes. Without actually saying that the relative tax rates would be the same, whether the tax be directly upon property or upon incomes, they plainly assume the truth of that false statement and wish it to be accepted.

Speaking with approximate accuracy and according to the latest census data then or now available, New York has ten per cent of the population of the country and fourteen per cent of the property, while Mississippi has two per cent of the population and three-fifths of one per cent of the property. From this it follows that an apportioned *property* tax which calls for a tax rate of one per cent in New York would require a tax rate of more than four per cent in Mississippi. An apportioned *income* tax would show a much greater inequality. Even if statistics were entirely lacking, it would not be denied that taxable incomes, much more than property, are concentrated in the wealthier states, especially in those containing large cities. "Fifth Avenue" draws its golden streams of income not alone from property within the state of New York, but from the mines, the farms and the industries of the entire country.

But we have relevant statistics. In 1870 the Federal Government taxed incomes above one thousand dollars at the uniform rate of five per cent. In that year New York, though it had only twenty-one per cent of the nation's property, had twenty-eight per cent of the taxable income; for it paid twenty-eight per cent of the entire income tax collected in the country. In like manner it appears that in 1870 Mississippi had seven-tenths of one per cent of the nation's property, but only one-fourth of one per cent of the taxable income. The concentration of large incomes in the wealthy states, in proportion to property, is undoubtedly much greater now than it was in 1870.

Assuming that there has been only a slight increase in such concentration and that residents of New York now receive twenty per cent of the country's taxable income while residents of Mississippi receive one-fifth of one per cent, it may be shown that an apportioned tax which required a rate of only two per cent on incomes in New York would necessitate a rate of forty per cent on incomes in Mississippi. If the Federal Government were to tax incomes in this manner, how long would it take the remaining Mississippi millionaires to change their legal residence to a more favored state? After their removal the difference between the tax rates would be greater than before; and the migrations of the rich and well-to-do from the poorer states would be like the exodus of Israel from Egypt. Any attempt to enforce such a tax would defeat its own object.

But suppose, for the sake of argument, that the table furnished by these gentlemen does give the tax rates that would arise in the different states from an apportioned income tax as well as from an apportioned property tax, and that in the future also the distribution of incomes will conform with the distribution of property. The tax rates given in this table vary from 23 cents in Nevada to $2.96 in Mississippi. Most of the southern and border states would have very high rates, from $1.00 to $2.96. This is explained in the "memorandum" on the theory that these states "sacrificed their property by the Civil War," and it is said that "they are rapidly retrieving that disaster" and would soon be at no great disadvantage.

That the southern and border states have been retrieving the disasters of the Civil War is true. But that they are likely to increase in per capita wealth *enough faster than the rest of the country* to reduce greatly their relative tax rate in case of an apportioned tax, is untrue. From 1890 to 1900, and from 1900 to 1904, the latest year for which census figures are available, the fifteen southern and border states gained in per capita wealth at a slower rate than the rest of the country.* Up to 1904 the burden of an apportioned tax for them was increasing; and this "memorandum" offers nothing to show that this tendency has been reversed since 1904. If it ever is reversed, the inequality to be overcome will be enormous.

But if we exclude these fifteen states and Oklahoma (whose rate is $2.36),

*The results of the census of 1910 with reference to the wealth of the several states, have not yet been published.

the rates in the remaining states will range from 23 cents in Nevada to $1.08 in Vermont. The per capita wealth seems to be great in a number of the western states. In Wyoming the tax rate would be only 36 cents; in California, 47 cents; in Montana, 51 cents; in Nebraska, 60 cents; in Colorado, 61 cents. New York would have a rate of 67 cents; Massachusetts, 70 cents; Pennsylvania, 71 cents; Rhode Island, 72 cents. Among the northern states having the highest rates would be Vermont, with $1.08; Maine, with $1.04; Indiana, with $1.03; New Hampshire, with 97 cents; and Wisconsin, with 93 cents.

In view of the wide differences in the per capita wealth of the states, differences which have always been great and show no signs of disappearing, we read with some amusement the admission in this "memorandum," that an apportioned direct tax will "temporarily" operate harshly "as to a few states"; and one hardly knows how to characterize, in polite language, the statement that the southern and border states are "the only states that would pay disproportionately at the present time."

But whatever may be the inequality of an apportioned income tax, Messrs. Choate, Guthrie, Morawetz, Fox and Milburn say that the people of the United States should submit to it for two reasons:

1. Because this inequality was solemnly agreed to at the time the Federal Constitution was adopted, being one of the terms that entered into the compromises of the Constitution.

2. Because, if an income tax could be levied without apportionment, the people would exempt small and moderate incomes and would tax large incomes progressively, so that residents of a few wealthy states would pay an unjust portion of the tax.

Neither reason is tenable. The provision in the Constitution that "representatives and direct taxes" should be apportioned among the states according to population, had a peculiar importance on account of the agreement that "population" should include three-fifths of the slaves. But this importance vanished at the emancipation of the negroes.

It is insisted, however, by Mr. Choate and his friends that the apportionment of direct taxes was agreed to as a part of the compromise by which the states were guaranteed equal representation in the Senate unless they should voluntarily relinquish it. No proof is given in the "memorandum," except that these two provisions were included, with many others, in the final draft of the Constitution. The states especially interested in equal representation were those having a small territory and few inhabitants. The states unfavorably affected by the apportionment of taxes were those in which the per capita wealth was small. Were these two groups of states identical? The matter of apportioning taxes, aside from the related question of counting the slaves, was only casually discussed. It was not closely connected with representation in the Senate.

Even if these matters had been closely related as parts of a distinct compromise, that fact should not now prevent an amendment that is just and expedient and is not forbidden by the constitution.

But, whatever this alleged agreement or compromise was, it related only to "direct taxes" in the sense in which that term was used in the Constitution. Until 1895 the universal opinion was that an income tax is not a "direct tax" in this sense. This was confirmed by the uniform practice of Congress in the levying of taxes, by the unanimous authority of judicial writers and by repeated decisions of the United States Supreme Court. Mr. Choate and his associates, carefully concealing this important fact from their readers, quote the following language of Alexander Hamilton, found in No. 36 of *The Federalist:*

> Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legislature, but is to be determined by the numbers of each state, as described in the second section of the first article. An actual census or enumeration of

the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression.

Mr. Hamilton is "speaking of direct taxes," say these gentlemen, expecting their readers to believe that he was speaking of income taxes along with others; but in the two paragraphs preceding the one quoted Hamilton speaks solely of taxes applicable "to real property or to houses and lands," describing them by the term "land taxes." The only subject to which his words, "these taxes," can possibly refer, is the subject of land taxes.

In No. 21 of *The Federalist*, Hamilton uses language which would have disconcerted Mr. Choate and his fellow lawyers if they had read it. After commenting on the "glaring inequality and extreme oppression" which would result from an attempt "to regulate the contributions of the members of a confederacy" by apportionment according to population or the value of lands, Mr. Hamilton says:

> This inequality would of itself be sufficient in America to work the eventual destruction of the Union, if any mode of enforcing a compliance with its requisitions could be devised. The suffering states would not long consent to remain associated upon a principle which distributes the public burdens with so unequal a hand, and which was calculated to impoverish and oppress the citizens of some states, while those of others would scarcely be conscious of the small proportion of the weight they were required to sustain.

What the Constitutional term "direct taxes" meant, can best be told by men who took part in framing and adopting the Constitution. In 1796, in the case of Hylton vs. United States, the Supreme Court decided without dissent that a tax on carriages is not a "direct tax." The six members of the court had been very prominent in public life. Two had signed the Declaration of Independence; three had been in the constitutional convention; five had been in state ratifying conventions; three had been members of Congress under the Confederation; and two had been United States Senators. In rendering his opinion Justice Paterson said:

> It was obviously the intention of the framers of the Constitution that Congress should possess full power over every species of taxable property, except exports. . . . A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states there are many carriages, and in others but few.

The two other justices who rendered opinions agreed with Justice Paterson that it was "unreasonable to say that the Constitution intended" any tax to be levied by apportionment if it could not be apportioned "without great inequality and injustice."

From 1863 to 1873, the Federal Government imposed a general income tax without apportionment. In 1880, in the case of Springer vs. United States, it was contended by the plaintiff that this tax was unconstitutional because it was a direct tax and was not apportioned among the states. The opinion of the court was unanimous and summed up a century's development in the law on this question. The court said:

> The text writers of the country are in entire accord upon the subject. . . . Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains, is within the category of an excise or duty.

In support of the second reason given above, it is stated that "under the proposed amendment Congress would have power to exempt incomes under prescribed amounts and to levy graduated or progressive income taxes." It is said in the "memorandum":

> By exempting incomes under $5,000, or $10,000 or $20,000, or possibly $100,000, the few rich men, constituting everywhere the minority, could be made to bear the whole burden of taxation for the benefit of the majority of property owners.

What has become of Mr. Choate's well known sense of humor? After the long-suffering patience of the American people with the tax-dodging of rich men, lawful and unlawful, after the forbearance with which those of small means have borne the merciless discriminations imposed upon them by taxes on consumption, it is hard to take seriously the objection that the people would impose unjust burdens on the rich through income taxes. There would be exemptions, perhaps higher than these gentlemen and their clients would approve, but reasonable; and possibly the progressive principle would be applied, as it ought to be, to offset the discrimination against moderate incomes by tariff taxes and because large incomes can better endure taxation than small incomes. But on the record of the past and on common knowledge of the character of the American people, it is unwarranted to claim that they would unjustly and oppressively use the power to tax incomes. Nevertheless, some of the wealthier and more powerful members of the community, having long profited by tax discriminations in their favor, are probably now in the position of the prisoner at the bar who, on being assured by the judge that he would get justice, answered: "That is just what I'm afraid of."

In spite of their grave apprehensions of injustice from a *Federal* income tax, the authors of this "memorandum" say:

> It should also be borne in mind that New York may any day want to levy an income tax as a substitute for the present personal property tax and in order to relieve real estate. . . . If Congress should also have and exercise the same power, the resources of the state in that respect, to provide for her own urgent public improvements, would be necessarily curtailed.

Angels of grace and mercy defend us! Would men who tremble for the fate of wealth at the hands of the masses of the American people, lay bare the incomes of New York's multimillionaires to the tender mercies of representatives of rural New York and the poverty-stricken districts of her great cities? What has allayed their fear of oppression? The fact is that a national income tax would be framed as justly as a state income tax, and these gentlemen know it. The states have all the ordinary powers of taxation, and their resources are ample for their needs. The national government should have the power to tax incomes in order to equalize the burdens of taxation and to defend the national honor and existence in times of peril.

NOTE—Mr. Choate and his associates also urge the objection that the amendment, in its present form, would authorize Congress to tax incomes from state and municipal funds and salaries of state and municipal officers. This objection seems to have been sufficiently answered by Senator Root, in his communication to the Legislature, and Professor Seligman, in his article in the Political Science Quarterly for June, 1910.

END OF
TITLE